STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO JASPER COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Eric Darien ..... Petitioner,

v.

State of South Carolina, ... Respondent.

Appellate Case No. 2016-001685

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT ISSUE PRESENTED

Is there probative evidence to support the PCR court's finding Counsel was not deficient because law enforcement's questions did not suggest Petitioner had the burden of proof and Petitioner did not prove he was prejudiced by Hipp's statements?

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "**any** evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF FACTS

Procedural History

On December 16, 2008, Petitioner was indicted by the Jasper County Grand Jury for murder. App. 363. Petitioner was represented by Michael McCloskie (Counsel), Esquire. Petitioner proceeded to trial on February 8, 2010. App. 1. The jury acquitted Petitioner of the murder charge, but found him guilty of the lesser-included voluntary manslaughter. App. 239. On February, 10, 2010, the Honorable Carmen T. Mullen sentenced Petitioner to eighteen years' incarceration. Petitioner filed a motion to reconsider the sentence. App. 251. On June 8, 2010, Judge Mullen heard arguments based on Petitioner's motion to reconsider. App. 252. At the conclusion of the hearing, Judge Mullen reduced Petitioner's sentence to fifteen years' incarceration. App. 260.

Petitioner filed a timely notice of appeal. Petitioner was represented by Robert M. Dudek (Appellate Counsel), Esquire, on appeal. App. 263. On December 13, 2011, Appellate Counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967) on Petitioner's behalf. App. 263. On May 16, 2012, the Court of Appeals dismissed Petitioner's appeal in an unpublished opinion. App. 277. Remittitur was issued on June 5, 2012. App. 279.

Petitioner filed a PCR application on February 21, 2013. Respondent received the application on July 2, 2014. Respondent made its Return on September 8, 2015. An evidentiary hearing was convened on March 3, 2016, at the Beaufort County Courthouse in Beaufort, South Carolina. James K. Falk (PCR Counsel), Esquire, represented Petitioner. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On May 17, 2016, the Honorable R. Lawton McIntosh signed an order of dismissal denying and dismissing Petitioner's allegations.

Statement of Facts

Petitioner shot and killed the victim (Bubba), Petitioner's half-brother. This was undisputed. At trial, Petitioner argued he fired the shots in self-defense. Shakaria White was driving in a car with Bubba when Bubba saw Petitioner and told White to stop the car. App. 93. The start of the conflict involved a fist fight between Petitioner and Bubba at night. There was conflicting testimony concerning whether Petitioner or Bubba threw the first punch to start the fist fight. App. 93. However, it was undisputed Bubba won the fight and was beating Petitioner up. It is also undisputed Bubba stopped fighting Petitioner and started walking away of his own volition. App. 88; 110. As he was walking away from Petitioner, Bubba told White to take him home so he could get his gun. App. 90. Petitioner then proceeded to fire one round at Bubba as Bubba walked away. App. 98. After the first shot, Bubba dropped to the ground. App. 111. Bubba then turned around and charged Petitioner. App. 102; 111. Petitioner then shot Bubba three times at close range. App. 111. Law enforcement took Petitioner to the hospital to have his injuries examined. App. 76. The doctor's diagnosis was Petitioner's head had bruises and he was prescribed Motrin, an over-the-counter drug. App. 161.

Relevant Trial Testimony

After being read his Miranda rights, Petitioner made a statement to law enforcement. App. 149. Law enforcement recorded the statement with audio equipment. App. 149. After the audio tape of Petitioner's statement was published to the jury, Counsel objected to the comments in the audio tape concerning Petitioner's arrests. App. 150. The trial court sustained the objection and gave a curative instruction:

> All right. Your objection is sustained. Ladies and gentlemen, the last portion of that tape was improper. It should not be before you. You are not to consider it in any way in your deliberations in this case.

App. 150.

Counsel did not object to the statements law enforcement made during their interrogation of Petitioner on the audio tape or have them redacted. During the interrogation, Detective Donald Hipp made the following statements to elicit a response from Petitioner: "I'm not the one that was out there. I have nothing to prove." App. 341. "You don't have a right to take a man's life." App. 335. "You shot him in the back." App. 335. The pathologist testified the bullets were fired into Bubba's back and this was undisputed at trial. App. 135. Petitioner was "too close for that shot to have been fired in self-defense." App. 335. Trial counsel did use portions of Petitioner's responses to Hipp's statements in his closing argument. App. 213.

Relevant Post-conviction Relief Hearing Testimony

Counsel received discovery from the State, which included Petitioner's statement to law enforcement and reviewed it numerous times. App. 304. Counsel believed the State could prove its case without Petitioner's statement due to the consistent testimony of multiple eyewitnesses. App. 304. Counsel testified his strategy was to pursue a self-defense claim. App. 305. Counsel also testified, "The forensics didn't bear [the self-defense claim] out." App. 305. Counsel testified he based the self-defense theory on Petitioner's statement and what Petitioner told him. App. 305.

At the PCR hearing, Counsel testified he did not believe there was a legal argument to keep out Petitioner's statement. App. 312. Counsel testified he should have asked for some of the law enforcement's statements on the tape to be redacted. App. 314. Counsel admitted he did not ask for curative instructions or move for mistrial concerning law enforcement's statements. App. 322. Counsel stated he did not have a trial strategy for not objecting to those statements. App. 322.

On cross-examination, Counsel testified he believed Petitioner's statement to be voluntary and had been practicing law for 49 years. App. 323. Counsel also testified he had

challenged many defendants' statements, and had been successful previously; but challenges statements on a case-by-case basis. App. 324. Petitioner misrepresents Counsel's statements when he argues counsel admitted he should have objected to the statements by law enforcement. PWC 7-8. Counsel's statement was general in nature. Counsel's only concession was if a matter was objectionable then he should have objected. App. 324. "Q: And if you found something that was objectionable in this police officer's statements to Mr. Darien, you would have objected, wouldn't you? A: I should have." App. 324. Here, the material was not objectionable and, therefore, Counsel should not have objected.

ARGUMENT

There is probative evidence to support the PCR court's finding Counsel was not deficient because law enforcement's questions did not suggest Petitioner had the burden of proof and Petitioner did not prove he was prejudiced by Hipp's statements.

There was probative evidence to support the PCR court's finding Counsel was not deficient under Strickland for not objecting to Detective Donald Hipp's statements. Further, Petitioner failed to prove he was prejudiced by Hipp's statements such that there was a reasonable probability the result of the proceeding would have been different.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). "When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). An applicant must overcome this presumption to receive relief. State v. Cherry, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude a particular act or omission of counsel was unreasonable. Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland,

466 U.S. at 689. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

A. Petitioner's reliance on State v. Brewer is unfounded.

Petitioner's reliance on Brewer is unfounded because Brewer is easily distinguishable from Petitioner's case. State v. Brewer, 411 S.C. 401, 768 S.E.2d 656 (2015). In Brewer, the substantive facts were in dispute, unlike in Petitioner's case. Id. at 405, 678 S.E.2d at 657-658. Here, the facts were not in dispute and were established by multiple witnesses with consistent stories. The witnesses established there was a fight between Petitioner and Bubba. Bubba won the fight. Bubba stopped fighting and walked away. Bubba told White to take him to his home to get his gun. App. 90. Petitioner fired one shot at Bubba as Bubba walked away. Bubba turned

around and charged Petitioner. Petitioner shot Bubba three more times, which resulted in Bubba's death.

The issue considered in Brewer was hearsay testimony offered for the truth of the matter asserted. Brewer, 411 S.C. at 405, 678 S.E.2d at 657-658. Petitioner's allegation is the State shifted the burden of proof to Petitioner. This issue was not considered or addressed by Brewer. In dicta, Brewer reprimanded the State for audio statements by law enforcement repeatedly insisting the defendant must prove his innocence. Here, law enforcement did not insist Petitioner prove his innocence or provide evidence of his innocence. The facts were clear and undisputed from multiple witnesses. The only evidence law enforcement sought from Petitioner was his point of view.

Brewer was handed down nearly five years after Petitioner's trial. Brewer was decided on January 28, 2015. Id. Petitioner's trial took place on February 8, 2010. App. 1. Counsel could not have utilized the court's guidance in Brewer because the opinion was not yet in existence. "This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial." Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Counsel was not deficient for failing to use Brewer, not yet in existence, to object to statements made by law enforcement on the audio tape.

Therefore, Petitioner's reliance on Brewer is misguided as Brewer is clearly distinguishable from Petitioner's case. Further, Brewer's guidance was not yet in existence at the time of Petitioner's trial. Therefore, Counsel's failure to object to the statements did not fall below professional norms where the only case Petitioner relies on for his allegation was not yet in existence.

B. Petitioner was not prejudiced due to the overwhelming evidence of guilt for voluntary manslaughter.

The evidence of Petitioner's guilt was overwhelming. See Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (applicant cannot prove prejudice where there is overwhelming evidence of guilt). His guilt was conclusively proven and the only other rational conclusion that could have been reached by the jury was a verdict of guilty for murder. As Counsel testified, the facts did not support self-defense. App. 304. It was uncontroverted Bubba was walking away when Petitioner started shooting. App. 88; 110. Bubba stated he wanted to go home to get his gun, while walking away from Petitioner. This statement, in the context of Bubba walking away, clearly did not place Petitioner in imminent danger. App. 90. Imminent danger is required to establish self-defense and there was no evidence presented Petitioner was in actual imminent danger when he started shooting Bubba. Therefore, the question for the jury was whether Bubba's fight with Petitioner and his threat that he was going to get his gun provided sufficient legal provocation or not. The jury decided Bubba's actions provided sufficient legal provocation and, therefore, found Petitioner guilty of the lesser-included offense of voluntary manslaughter. Therefore, Petitioner received the best possible result from his trial and was not prejudiced because there was overwhelming evidence of guilt for the charge of voluntary manslaughter.

C. Petitioner failed to cite case law supporting the proposition a witness's statement can shift the burden of proof.

Petitioner has failed to cite any case law showing witness testimony can be burden-shifting where the trial judge gives an accurate instruction on the State's burden of proof. Brewer did not consider burden-shifting in its opinion. No case law has been cited to support the allegation witness statements can shift the burden of proof to a defendant. "An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not

supported by authority." State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). Petitioner has presented no case law supporting the assertion a witness's statement, which did not even reference Petitioner, can shift the burden of proof to the defendant.

There is clear case law the solicitor can shift the burden of proof. "[T]here is no doubt the State's closing argument gave the impression that Petitioner bore some burden of proof on the issue of alibi, as the Solicitor referenced whether Petitioner could *prove* that he was at another place during the crime." Gibbs v. State, 403 S.C. 484, 499, 744 S.E.2d 170, 178 (2013). Petitioner has not challenged any of the statements made by the solicitor in his closing argument. There are numerous cases supporting the proposition a solicitor's shifting of the burden of proof can be cured by a correct instruction on the burden of proof from the trial judge. "[A]n alibi charge here was necessary to correct any indication the Solicitor may have given in his closing remarks that Petitioner bore *any* burden of proof at trial." Id, 403 S.C. at 498, 744 S.E.2d at 177–78. "The trial court's instruction to the jury that it could not consider appellant's failure to testify in any way and could not use it against him cured any potential error." State v. Shuler, 353 S.C. 176, 187, 577 S.E.2d 438, 444 (2003). "[T]he trial court's instruction to the jury that it could not consider Johnson's failure to testify in any way and could not use it against him sufficient to cure any potential error." Johnson v. State, 325 S.C. 182, 188, 480 S.E.2d 733, 735–36 (1997). Here, the trial judge explicitly instructed the jury the State had the burden of proof. "The burden of proof is on the State of South Carolina to establish his guilt by competent evidence beyond a reasonable doubt." App. 229, l. 23-25.

Similarly, a trial judge's jury instructions can shift the burden of proof. "[T]he Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant." State v. Belcher,

385 S.C. 597, 608, 685 S.E.2d 802, 808 (2009). However, the trial judge correctly instructed the jury the State had the burden of proof. App. 229.

Petitioner has failed to provide case law supporting the proposition witness testimony or audio evidence of an interview of a defendant can shift the burden of proof when the trial judge gives an appropriate jury instruction on the burden of proof. Therefore, Petitioner has failed to support his allegation with authority and this issue should be deemed abandoned.

D. Hipp's statement did not shift the burden of proof to Petitioner and was not prejudicial to Petitioner.

The interviewing officer, Detective Hipp, made one statement Petitioner contends was burden-shifting: "I'm not the one that was out there. I have nothing to prove." App. 341. Hipp's statement did not assert Petitioner was guilty unless he provided evidence to law enforcement. "There is no indication that the solicitor's line of questioning suggested that the defendant had the burden of proof or obligation to produce certain evidence; rather, the solicitor's questions demonstrate that she was exploring and examining Cowan's testimony and his defense. As such, Cowan has failed to demonstrate these questions were improper." Cowan v. McCall, No. CA 0:10-2100-RBH-PJG, 2011 WL 4345821, at *7 (D.S.C. Aug. 23, 2011). Here, the questions were asked by a law enforcement officer. However, the logic used in Cowan still applies. Hipp's statement was exploring Petitioner's answers and did not assert Petitioner had the burden of proof or was under the obligation to provide evidence. Hipp's statement merely asserted he was not present at the scene and could not answer his own questions. The statement did not draw a negative inference from defendant's failure to present evidence. Cf. State v. Posey, 269 S.C. 500, 504, 238 S.E.2d 176, 177 (1977) (prohibiting the State from telling the fact-finder to draw a negative inference when the defendant fails to present any evidence at trial.) Instead, the statement was merely an assertion if Petitioner wanted to tell Hipp his side of the story he needed

to tell Hipp what happened. It is not logical to conclude a jury would hear Hipp's statement and assume Petitioner needed to provide additional facts to law enforcement to prove his innocence. This logic is particularly spurious where, as here, the facts were not in dispute. Law enforcement was not attempting to elicit additional facts or evidence from Petitioner, only Petitioner's view point. Therefore, Hipp's statement was not burden-shifting because the statement only asserted Hipp did not personally experience the incident and did not require Petitioner to provide evidence.

Petitioner was also not prejudiced by the introduction of the statements, which provided Petitioner the opportunity to assert his innocence and lack of ill-intent. Through Petitioner's replies to Hipp's statements, Petitioner was able to tell his side of the story. Counsel used Petitioner's statements on the audio tape in his closing argument as proof the State could not prove malice. App. 208-209. The record indicates the jury considered these arguments because they returned a verdict for the lesser-included offense of voluntary manslaughter, which does not require malice. App. 239. Therefore, Petitioner was not prejudiced by Hipp's statements.

E. Hipp's statements were not improper opinion testimony or prejudicial to Petitioner.

Hipp's statements to Petitioner were not improper opinion testimony nor did they prejudice Petitioner. During the interview with Petitioner, Hipp stated, "You don't have a right to take a man's life" and Petitioner was "too close for that shot to have been fired in self-defense." App. 335. "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: rationally based on the witness's perception; helpful to clearly understanding the witness's testimony or to determining a fact in issue; and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Rule 701, SCRE. Here, the witness was not testifying. The statements came in the form of an audio

recording of an interview. The statements were also not opinions. Petitioner was being questioned by law enforcement to obtain his side of the story. The statements by Hipp were interrogatory in nature and, as intended, elicited a response from Petitioner. Hipp's statements were not hearsay nor did they misrepresent the evidence in the case. "We emphasize that today's decision is not a categorical rule that any statement by an investigator during an interrogation is inadmissible at trial." Brewer, 411 S.C. at 407, 768 S.E.2d at 659. It was undisputed Petitioner shot Bubba. The only question for the jury was Petitioner's motivations for doing so. Hipp's interrogatory statements elicited responses from Petitioner concerning his motivations for shooting Bubba. Therefore, Hipp's statements were not improper in the setting of an interview and it is unreasonable to suppose the jury would interpret Hipp's statements as authoritative.

Further, any potential prejudice was cured by the trial judge's instruction on self-defense. "Now, the defendant has raised the defense of self-defense. Self-defense is a complete defense. If established, you must find the defendant not guilty." App. 230, l. 15-17. Hipp's statements, if improper, were clearly interrogatory in nature. The trial judge's instruction on self-defense was clear and thorough. App. 230-233. (Improper comments on the law can be cured by a trial court's instruction to the jury correcting potential misinterpretations by the jury.) See State v. Shuler, 353 S.C. 176, 187–88, 577 S.E.2d 438, 444 (2003). Therefore, Hipp's statements were not improper and Petitioner was not prejudiced.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests the petition be denied. If this Court sees fit to grant the petition for writ of certiorari, Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
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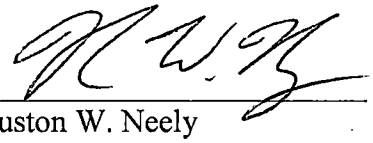
Assistant Attorney General

BY: 
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ERIC DARIEN, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to the Petition for Writ of Certiorari** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

This 8th day of September, 2017.

Jennifer Jennison
Jennifer A. Jennison
Legal Assistant for Petitioner